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No. 97-822

IN THE

Supreme Court of The United States

October Term, 1997

FAIR; FIRST ASSEMBLY OF GOD OF VENTURA; JAMES W. WILLIAMS, III;R.H. SMITH FAMILY PARTNERSHIP; LEAVENS RANCHES; ROBERT TOBIAS; STEPHEN TOBIAS; J.D. MCGRATH FARMS;HOWARD AND HOWARD RANCH; DANIEL CAMPBELL; ITO FARMS; THE CONTRERAS FAMILY; and HIJI BROS.,

Petitioners,

vs.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT AFTER DENIAL OF REVIEW BY THE CALIFORNIA SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER FIRST ASSEMBLY OF GOD OF VENTURA

James A. Hayes, Jr.
Counsel of Record
28202 Cabot Road, Suite 100
Laguna Niguel, CA 92677
(714) 347-7900

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 E. Rio Road
Charlottesville, VA 22901
(804) 978-3888

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Rutherford Institute hereby respectfully moves the Court for leave to file the following brief *amicus curiae* in this case. The consent of counsel for the Petitioners has been obtained. The consent of counsel for the Respondents has been requested but refused.

The interest of the Institute in this case arises from its activity as a non-profit legal services organization representing individuals in cases nationwide in defense of civil and religious liberties, including numerous appearances before this Court.

The Institute is submitting a brief *amicus curiae* on behalf of one of the petitioners, First Assembly of God of Ventura ("Church"). The Church is one of thirteen petitioners in this case, who collectively raise a variety of claims for

infringement of their constitutional rights. The Church, specifically, argues in the petition that its cause of action, alleging that Respondents substantially burdened its free exercise of religion without a compelling interest, should be reinstated in the state trial court and heard on the merits. This argument raises the issue of the viability of the Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990), holding that neutral laws of general applicability that incidentally burden religious free exercise are constitutional. Because of the large number of petitioners and issues to address in the petition, the brief *amicus curiae* which the Institute seeks leave to file contains a more complete argument urging the Court to grant the petition and certify the question of whether *Smith* should be reconsidered and overruled. The viability of *Smith* as precedent has been strongly called into questions by three Justices in *City of Boerne v. Flores*, 117 S.Ct. 2157 (O'Connor, J.; Souter, J.; and Breyer, J., dissenting).

In light of this issue being raised in the petition and the strong interest of several members of the Court, the Institute respectfully requests that its arguments in support of the Church be heard.

Respectfully submitted,

James A. Hayes, Jr.
Counsel of Record
28202 Cabot Road, Suite 100
Laguna Niguel, CA 92677
(714) 347-7900

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 E. Rio Road
Charlottesville, VA 22901
(804) 978-3888

December 18, 1997

QUESTION PRESENTED

Whether the use of the compelling interest test in the pre-*Employment Division v. Smith ("Smith")* Free Exercise decisions of this Court correctly reflected the historical origins and understanding of the Free Exercise Clause, and thus the First Assembly of God of Ventura ("Church") properly stated a claim against the City of San Buenaventura ("City") by alleging that a popularly-enacted measure, requiring the Church to qualify a ballot initiative and obtain a majority of the voters of the City to approve the use of its property to develop a place of worship, substantially burdens its Free Exercise rights guaranteed by the Fourteenth Amendment to the United States Constitution without a compelling government interest.

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*... i

QUESTION PRESENTED iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

BRIEF *AMICUS CURIAE* 1

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION 1

II. RECONSIDERATION OF *SMITH* IS SQUARELY RAISED IN THIS CASE BECAUSE THE CHURCH ALLEGED IN ITS COMPLAINT THAT MEASURE I SUBSTANTIALLY BURDENED ITS RIGHT TO FREE EXERCISE WITHOUT A COMPELLING GOVERNMENT INTEREST, WHICH IS THE PRE-*SMITH* STANDARD FOR DECIDING FREE EXERCISE DISPUTES 4

III. THE PRE-*SMITH* DECISIONS OF THIS COURT IN FREE EXERCISE CASES EMBODY THE HISTORICAL UNDERSTANDING THAT RELIGIOUS PRACTICES ARE PROTECTED FROM THE BURDENSOME EFFECTS OF NEUTRAL LAWS OF GENERAL APPLICABILITY 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arkansas Educational Television Comm. v. Forbes,
93 F.3d (8th Cir. 1996), *cert. granted* (No. 96-779).....1

Bob Jones University v. United States
461 U.S. 574 (1983).....7

Bowen v. Roy
476 U.S. 693 (1986).....9,10

Brown v. Socialist Workers '74 Campaign Committee
(Ohio) 459 U.S. 87 (1982) 8

Cantwell v. Connecticut
310 U.S. 296 (1940).....7,8,9,10

Church of the Lukumi Babalu Aye v. City of Hialeah
508 U.S. 520 (1993)..... *passim*

City of Boerne v. Flores
___ U.S.___, 117 S.Ct. 2157 (1997)..... *passim*

Employment Div. v. Smith
494 U.S. 872 (1990)..... *passim*

Frazee v. Illinois Department of Employment Security
489 U.S. 829 (1989).....7,9

Hernandez v. Commissioner
490 U.S. 680 (1989).....7

Hobbie v. Unemployment Appeals Comm'n
480 U.S. 136 (1987).....7,9

Hustler v. Falwell
458 U.S. 46 (1988).....8

Jimmy Swaggart Ministries v. Board of Equalization
493 U.S. 378 (1990).....7

Lyng v. Northwest Indian Cemetary Protective Ass'n
485 U.S. 439 (1988).....10

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Minersville School District v. Gobitis
310 U.S. 586 (1940) 8,10

NAACP v. Alabama
357 U.S. 445 (1958) 8

O'Lone v. Estate of Shabazz
482 U.S. 342 (1987) 10

Reynolds v. United States
98 U.S. 145 (1879) 9,10

Sherbert v. Verner
374 U.S. 398 (1963) 7,10

Thomas v. Review Board
450 U.S. 707 (1981) 7,10

United States v. Lee
455 U.S. 252 (1982) 7,10

West Virginia Board of Education v. Barnette
319 U.S. 624 (1943) 5,8

Yoder v. Wisconsin
406 U.S. 205 (1972) 7,9,10

CONSTITUTIONS

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV iii

FEDERAL STATUTES

Religious Freedom Restoration Act,
42 U.S.C. § 2000bb, *et seq* 3

TABLE OF AUTHORITIES (CONT'D)

Page

MISCELLANEOUS AUTHORITY

Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992) 7

Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99 (1990).....3,6,8

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Har. L. Rev. 1409 (1990)..... *passim*

Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990).....6,10

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER FIRST ASSEMBLY OF GOD OF VENTURA

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION

The Rutherford Institute is a non-profit organization established in 1982 and based in Charlottesville, Virginia, providing legal services nationwide in defense of civil and religious liberties. The Institute has appeared numerous times before this Court on such matters, most recently as *amicus curiae* to the Archbishop of San Antonio in *City of Boerne v. Flores*, ___ U.S. ___, 117 S.Ct. 2157 (1997), and as counsel of record for Respondent in *Arkansas Educational Television Comm. v. Forbes*, No. 96-779. The Institute believes that the religion issues raised by Petitioners are critical to the

fundamental right to free exercise of religion for all Americans.

Amicus curiae supports one of the petitioners in this matter, First Assembly of God of Ventura ("Church"), and expands on the issue raised more generally (due to length constraints) in Petitioners' brief that Respondent City of Buenaventura has substantially burdened the Church's rights under the United States and California Constitutions to Free Exercise of Religion without a compelling government interest.

This brief urges the Court to take this opportunity to reconsider its holding in *Employment Div. v. Smith*, 494 U.S. 872 (1990), that neutral laws of general applicability do not offend the Free Exercise Clause, and restore the compelling interest test for deciding Free Exercise cases.

Three Justices have strongly expressed their desire to reconsider *Smith* in dissents to the Court's ruling last term in *City of Boerne v. Flores,* 117 S.Ct. at 2185 (Souter, J., dissenting); *Id.* at 2176 (O'Connor, J., dissenting and joined in part by Breyer, J.). Justice Souter renewed his call to reconsider *Smith*, first raised in his lengthy concurring opinion in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 564 (1993)(Souter, J., concurring in part and concurring in the judgment). Justice O'Connor, in a separate dissenting opinion joined by Justice Breyer, further urged the Court to overturn *Smith* outright and return to the compelling interest standard. *Boerne*, 117 S.Ct. at 2176 (O'Connor, J., dissenting). Justice O'Connor examined in detail "the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause . . ." and concluded that "[t]he historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause." *Id.*

All three of the Justices would have directed the parties in *Boerne* to rebrief and reargue the case on the viability of *Smith* as precedent. The correctness of *Smith* was at issue in *Boerne* in order for the Court to pass on the constitutionality

of RFRA's enforcement of the free exercise right. *Id.* at 2186 (Souter, J., dissenting). But the majority did not find it necessary to reconsider *Smith* in order to rule that Congress had exceeded its constitutional powers in enacting the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, et seq., to countermand *Smith*. *Id.* at 2172. Thus, "our free exercise law remains marked by an 'intolerable tension' [cite omitted]. . . ." *Boerne*, 117 S.Ct. at 2186 (Souter, J., dissenting).

In *Lukumi*, Justice Souter observed that the *Smith* test should be reexamined "in the next case that would turn on its application." *Lukumi*, 508 U.S. at 564 (1993)(Souter, J., concurring in part and concurring in the judgment). Justice Souter entreated the Court to reexamine *Smith* because the decision was "decidedly untypical" of the Court's treatment of formally neutral, generally applicable laws in prior free exercise cases but did not overrule those cases. *Id.* The result was "a free-exercise jurisprudence in tension with itself." *Id.*

Both Justice Souter's concurring opinion in *Lukumi* and Justice O'Connor's dissent in *Boerne* rely on the important scholarly inquiry since *Smith* into the roots of free exercise of religion in this country, most notably Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). Such works were not available to the Court at the time it decided *Smith*[1], and if they had been, the Court may have found the historical justification of its free exercise precedents persuasive and upheld the compelling interest test. *See Lukumi*, 508 U.S. at 574-75 (Souter, J., concurring in part and concurring in the judgment).

This brief will not restate in detail the analyses and the many complex arguments in favor of overturning *Smith* found in that scholarship on free exercise history. To do so would

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[1] See Douglas Laycock, The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed, 8 J.L. & Relig. 99, 102 (1990).

needlessly repeat the thorough review given those same works by Justice O'Connor's dissent in *Boerne* and Justice Souter's concurrence in *Lukumi*. The Court is commended to the original scholarship cited for the depth of the arguments which cannot be recreated in the space permitted here. *Amicus curiae* encourages the Court to re-examine *Smith* now in the light of this scholarship and overturn its holding. The history and original understanding of the Free Exercise Clause demonstrate its purpose to protect religious individuals, including the use of exemptions. The compelling interest test effectuates this purpose. This Court's pre-*Smith* opinions thus provide the correct standard for analyzing free exercise cases.

II. RECONSIDERATION OF *SMITH* IS SQUARELY RAISED IN THIS CASE BECAUSE THE CHURCH ALLEGED IN ITS COMPLAINT THAT MEASURE I SUBSTANTIALLY BURDENED ITS RIGHT TO FREE EXERCISE WITHOUT A COMPELLING GOVERNMENT INTEREST, WHICH IS THE PRE-*SMITH* STANDARD FOR DECIDING FREE EXERCISE DISPUTES

If the Court reconsiders and overrules *Smith* here, there will be justiciable issues to be tried on remand of the case to state trial court. The Church alleged in its complaint that its free exercise rights under the Constitution were substantially burdened by Measure I's requirement that it qualify a ballot initiative and obtain a majority vote of the citizens of Ventura in order to develop its land for a place of worship and religious school for its devotees. The state court of appeal sustained the City's demurrer to this cause of action on the ground that "Measure I places no burden on any religious belief." App. A-9.

On reinstatement of its complaint with instructions to the trial court to apply the compelling interest test, the Church will be able to present evidence that Measure I deprives it of its ability to serve its churchgoers by forcing it to submit to the enormous expense and uncertainty of a general popular

vote with no apparent compelling interest to do so. Furthermore, by forcing the Church to engage in a political campaign to use its property, Measure I also imposes on the Church the intolerable burden of losing its tax-exempt status, which requires it to refrain from political activity. Consequently, under Measure I, in order to make use of its property for religious purposes, the Church must risk its tax-exempt status by undertaking the financial drain of seeking the uncertain approval of the general populace in an election.

Of course, a lesser restrictive means of controlling growth in Ventura had always existed prior to Measure I. The City Council was responsible for land-use planning. Although seeking approval from this body entailed some uncertainty and expense, Measure I presents a practical and financial barrier to the Church using its property for the needs of its growing congregation.

Exempting churches from the whims of the majority in the political sector was precisely the original understanding of the Free Exercise Clause, as observed by Justice O'Connor in *Smith*:

> "'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of
>
> worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'"

Smith, 493 U.S. at 903 (O'Connor, J., concurring, quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1938).

Therefore, reconsideration of *Smith* will restore the compelling interest test and require Respondents to

demonstrate on remand a compelling need to subject the Church to the expense and risk of a general election in order to use its property to build a place of worship.

III. THE PRE-*SMITH* DECISIONS OF THIS COURT IN FREE EXERCISE CASES EMBODY THE HISTORICAL UNDERSTANDING THAT RELIGIOUS PRACTICES ARE PROTECTED FROM THE BURDENSOME EFFECTS OF NEUTRAL LAWS OF GENERAL APPLICABILITY

Smith did not overturn pre-*Smith* precedents. *Lukumi*, 508 U.S. at 573-74 (Souter, J., concurring in part and concurring in the judgment). *Smith* recharacterized the holdings of those cases in an effort to harmonize them with its reasoning. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1120-24 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99, 104-06 (1990). Since the *Smith* rule remains fundamentally at odds with those precedents, a genuine issue exists as to which constitutional rule is to be followed. *Lukumi*, 508 U.S. at 574 (Souter, J., concurring in part and concurring in the judgment).

There are other important reasons to reconsider *Smith*. First, the *Smith* rule was decided without briefing and oral argument. *Id.* at 571-72. Rarely, if ever, has the Court decided an issue of such magnitude, not presented by the parties or the facts of the case, without notice and argument. *See generally* Laycock, 8 J.L. & Reg. 99.

Second, and related to the first reason, *Smith* set forth a broader constitutional rule than was necessary to resolve the case. *Id.* at 572-73. Indeed, Justice O'Connor reached the same result as the majority by applying the existing free exercise precedents. *Id.*

Finally, in the course of making its sweeping rule, *Smith* did not inquire into the roots of the free exercise of religion to interpret the original meaning of the Free Exercise Clause. *Id.*

at 574-76. Before *Smith*, little information existed on the history of the Free Exercise Clause in either earlier Supreme Court opinions or in scholarly articles. Legal scholarship developed after *Smith* persuasively demonstrates that the pre-*Smith* compelling interest test is consistent with the original understanding that free exercise of religion was to be protected from the burdensome effects of neutral laws of general applicability. To be sure, scholarly opinion is not unanimous on this point. *See Boerne*, 117 S.Ct. at 2172-76 (Scalia, J., concurring); *see also*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). Nevertheless, even this disagreement underscores the need for the Court to consider the pertinent scholarship now if *Smith*'s vitality as precedent is to be secure.

Prior to *Smith*, the Court's decisions in free exercise cases consistently embodied the concept that the Free Exercise Clause required not only formal neutrality, which would prohibit only those laws whose object is to discriminate against religion, but also substantive neutrality, which would additionally require exempting religious practices from formally neutral laws. *Lukumi*, 508 U.S. at 562-66 (Souter, J., concurring in part and concurring in the judgment). The articulated rule applied in each of those cases was that a compelling government interest must be demonstrated to justify any substantial burden placed by the government on religious practice. There is no doubt that the Court applied heightened scrutiny in those cases. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *Bob Jones University v. United States* 461 U.S. 574, 604 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Yoder v. Wisconsin*, 406 U.S. 205, 215-29 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Cantwell v. Connecticut*, 310 U.S.

296, 304-07 (1940). *See also Lukumi*, 508 U.S. at 565-66)(Souter, J., concurring in part and concurring in the judgment).

In none of those cases did the Court inquire into the original meaning of the Free Exercise Clause in developing and applying the compelling interest test (nor did it in *Smith*), *Lukumi*, 508 U.S. at 574-75 (Souter, J., concurring in part and concurring in the judgment). Yet, that test emerged from the Court's natural reading of the Free Exercise Clause as a restriction on government's power to burden religious practices, whether by a law's object or by its unintended effect.

Such a reading is consistent with the Court's treatment of other First Amendment rights, frequently affording them exceptions from neutral, generally applicable laws. Laycock, 8 J.L. & Relig. at 103-04 (citing *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982); *NAACP v. Alabama*, 357 U.S. 445 (1958)(political parties and movements exempted from facially neutral disclosure laws); *Hustler v. Falwell*, 458 U.S. 46 (1988)(creating special defenses for media against facially neutral tort law).

It is apparent that a review of the historical origins of the Free Exercise Clause provides considerable support for the compelling interest test which the Court derived from a plain reading of the text. It certainly undermines the remark in *Smith* that the compelling interest test "contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885. Rather, it reveals how fully pre-*Smith* cases embodied the understanding of the framers of the Free Exercise Clause, and how far *Smith*'s rule diverges from it.

Smith is inconsistent with free exercise precedent, which dates from *Sherbert*. Instead of adhering to this precedent, the Court relied on and quoted extensively from *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), without mentioning that this case was essentially overruled in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *Smith*, 494 U.S. at 879. The Court also quoted from

the three-justice plurality opinion in *Bowen v. Roy*, 476 U.S. 693 (1986), even though that opinion was not followed by five other Justices in separate opinions. *Smith*, 494 U.S. at 883. *Bowen* was later expressly rejected in *Hobbie*, 480 U.S. 141 (1987). Also cited is an older case, *Reynolds v. United States*, 98 U.S. 145 (1879), which upheld a law prohibiting polygamy, practiced then by Mormons, but did so on the reasoning that the Free Exercise Clause protects only beliefs, not conduct. *Id.* at 166-67. But the Court later retreated from that position in *Cantwell*, 310 U.S. at 303-04. Even so, the Court has read *Reynolds*'s elaboration on the evils of polygamy as standing for the compelling interest test. *See, e.g., Sherbert*, 374 U.S. at 403.

In sum, these cases and their subsequent treatment by the Court validate the Court's continued endorsement of the compelling interest test, rather than support *Smith*'s rejection of it. *Lukumi*, 508 U.S. at 569-70 (Souter, J., concurring in part and concurring in the judgment).

Smith's treatment of *Cantwell* and *Yoder*, two cases which unquestionably required exemption of religious practices from neutral laws of general applicability, is also problematic. Rather than apply those cases as pure free exercise precedents, *Smith* instead recharacterizes them as "hybrids," involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881-82. This hybrid distinction, however, is not supported by either the text or the history of the Free Exercise Clause. Even so, religious freedom was the fundamental issue in both cases, as each was explicit in stating. *Cantwell*, 310 U.S. at 303-07; *Yoder*, 406 U.S. at 201. *Smith*'s attempt, then, at distinguishing *Cantwell* and *Yoder* as "hybrid" cases has instead shown them to be sound free exercise precedent.

Finally, *Smith* tries to reconcile its conclusion with the unemployment compensation cases involving free exercise: *Frazee*, 489 U.S. 829 (1989); *Hobbie*, 480 U.S. 136 (1987);

Thomas, 450 U.S. 707 (1981); and *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court noted that these were the only free exercise cases in which the compelling interest test had been used to invalidate a government action, and had only done so because they involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct," *Smith*, 494 U.S. at 883-84, and as such "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*

But as Professor McConnell has observed:

> "Difficulty of administration can fairly constitute at least part of the government interest in enforcing the law without exceptions, but it is hard to see why this concern should limit the universe of potential claims. Moreover, if this is the distinction, it is hard to see why the compelling interest test does not apply to many contexts other than just unemployment compensation - indeed to the full universe of claims governed by the due process requirement of 'some kind of hearing.'"

McConnell, 57 U. Chi. L. Rev. at 1123.

Moreover, *Smith*'s distinction of these cases is one without a difference, because most free exercise cases "resemble the unemployment compensation cases in that they involve individuated governmental assessments of the claimant's circumstances." *Id.* (citing *United States v. Lee*, 455 U.S. 252 (1982); *Lyng v. Northwest Indian Cemetary Protective Ass'n*, 485 U.S. 439 (1988); and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) as examples of non-unemployment compensation cases that involved such individuated governmental assessments without the application of the compelling interest test).

Smith, therefore, is unconvincing in its effort to achieve its result without overturning any precedent, by relying on cases of dubious currency (*Gobitis, Bowen* and *Reynolds*), and

by distinguishing established free exercise precedent as either not primarily about free exercise (*Cantwell* and *Yoder*) or as *sui generis* (the unemployment compensation cases).

In fact, these free exercise cases all demonstrate that the compelling interest test was a natural outgrowth of the Court's plain reading of the Free Exercise Clause as requiring exemption from neutral, generally applicable laws - a reading which now acquires added texture from the recent legal scholarship on the historical origins of the Free Exercise Clause.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Petition for Writ of Certiorari and certify the question of whether *Smith* is the proper legal standard for deciding free exercise cases in light of post-*Smith* legal scholarship, which casts serious doubt on *Smith*'s consistency with the original understanding of the Free Exercise Clause and which substantiates the consistency of the compelling interest test with that same understanding.

Respectfully submitted,

James A. Hayes, Jr.
Counsel of Record
28202 Cabot Road, Suite 100
Laguna Niguel, CA 92677
(714) 347-7900

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
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